

BEFORE THE  
SHORELINES HEARINGS BOARD  
STATE OF WASHINGTON

FRANK and DOROTHY HOSCHEK,

Appellants,

v.

CITY OF MERCER ISLAND and  
STATE OF WASHINGTON, DEPARTMENT  
OF ECOLOGY,

Respondents.

SHB No. 86-53

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW and  
ORDER

This matter, the request for review of a denial of a shoreline variance permit for development of a mooring pier and boat lift, came on for hearing before the Shorelines Hearings Board, Lawrence J. Faulk, Chairman; and Wick Dufford, Nancy Burnett, Thomas Cowan and Dennis McLerran, Members, convened at Mercer Island, Washington, on May 11, 1987. Mr. Dufford presided.

Appellants appeared pro se through Frank H. Hoschek. Respondent City of Mercer Island was represented by Assistant City Attorney Wayne Stewart. The Department of Ecology did not participate. Reporting service was provided by Lisa Flechtner.

1 Witnesses were sworn and testified. Exhibits were examined. From  
2 the testimony heard and exhibits examined, the Shorelines Hearings  
3 Board makes these ,

#### 4 FINDINGS OF FACT

##### 5 I

6 Frank and Dorothy Hoschek share with their son Douglas the  
7 ownership of a parcel of land at 5435 West Mercer Way in the City of  
8 Mercer Island, Washington. The parcel is shaped roughly like a frying  
9 pan, with the panhandle forming a strip 10 feet wide. The waterfront  
10 portion of the parcel is limited to 10 feet where the panhandle meets  
11 Lake Washington.

##### 12 II

13 Doug Hoschek purchased the property in 1981 and his parents  
14 acquired their interest in 1983. The upland part of the parcel is now  
15 the site of the senior Hoschek's residence.

16 At the time of these purchases the Mercer Island Shoreline Master  
17 Program was in effect, having been approved by the Department of  
18 Ecology on September 24, 1974.

##### 19 III

20 Included in the master program in 1974 was a provision  
21 establishing a minimum 10 foot setback from side property lines for  
22 single family piers, docks, mooring buoys, piles and other water  
23 structures (except bulkheads). This limitation is now codified at  
24 Section 19.04.130(AA)(1)(a) of the Mercer Island City Code.

25  
26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW & ORDER  
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IV

On May 19, 1986, Frank and Dorothy Hoschek applied to Mercer Island for a shoreline substantial development and variance permit to construct a mooring pier and boat lift on their 10 feet of waterfront.

The pier was proposed to be located three inches from the south property line and to extend 28 feet into the lake from the existing bulkhead. The first 18 feet from shore would be three feet wide; the remaining 10 feet would be a foot and a half wide. Into the notch created by the narrowing of the pier would be placed a boat lift, eight feet in width. At its widest part - including both pier and boat lift - the structure would occupy all but six inches of the 10 foot strip.

V

On June 20, 1986, the City of Mercer Island variance hearing examiner held a hearing to consider the Hoschek's application for a variance from the shoreline master program sideline setback requirement. At the same time he heard the Hoschek's request for a variance from certain provisions of the Mercer Island Zoning Code.

On July 29, 1986, the examiner entered his decision denying both the shorelines variance and the zoning variance requests. This decision was appealed by the Hoscheks to the Mercer Island City Council which affirmed the hearing examiner by a divided vote (3-2) after a public hearing held on September 22, 1986.

Thereafter, on October 16, 1986, the City issued its formal notice of denial of the shorelines variance.

The Hoscheck's appeal of the shorelines decision to this Board followed on November 20, 1986. No appeal was made of the denial of the variance from the general zoning code.

## VI

The Hoschek's property is in a neighborhood of waterfront lots and substantial homes where single family docks and piers are the rule rather than the exception. Their immediate neighbors on both the north and south have such docks. However, the adjacent lots are not frying pan shaped and they possess considerably more waterfront than does the Hoscheks' parcel. The docks on the properties adjoining the Hoschek's are set back more than 35 feet from the Hoschek's lot lines.

## VII

The property now owned by the Hoscheks was at one time part of a larger tract owned by a Mrs. J. G. Painton. This tract was initially segregated to form the present lot configuration in 1961. In 1966, drawings of this segregation were again placed on file with the City of Mercer Island, the originals apparently having been lost. The segregation was approved by the City in both instances.

## VIII

The water's edge is bulkheaded along the stretch of shoreline which includes the Hoschek's 10 foot strip. The bulkhead is

1 approximately 5 feet high. After his purchase, the Hoschek's son  
2 built steps in the bulkhead, providing ready access to the water.

3 In the high water summer months, the depth of the lake is about  
4 three feet at the steps. In winter this depth declines to about one  
5 and one half feet. The proposed deck would make about two feet of  
6 additional water depth easily accessible year around.

7 IX

8 The purpose of the project is to make getting into and out of a  
9 boat easier for the senior Hoscheks. They are an older, retired  
10 couple who wish to use a pleasure boat for fishing and other  
11 recreational pursuits.

12 A small motor boat was moored to a buoy in front of the 10 foot  
13 strip when the appellants moved to the property. This buoy was  
14 eventually removed, but a boat has been anchored in front of the  
15 parcel in recent times.

16 The present bulkhead-with-steps arrangement permits easy access to  
17 the boat in times of calm high water. However, during winter when the  
18 lake level is lowered, the boat can't be brought up next to shore and  
19 getting to it at anchor is a problem for the senior Hoscheks.

20 X

21 The Hoscheks assert that Mercer Island is not uniformly enforcing  
22 the shoreline sideline setback in relation to piers and docks and that  
23 they are victims of unfair and discriminatory treatment.

1 Dock and piers within 10 feet of side property lines do exist on  
2 Mercer Island. However, it was not shown that any such docks were  
3 unlawfully constructed at the time of their installation. Moreover,  
4 no pattern of granting shorelines variances to others for docks or  
5 piers in comparable circumstances was shown.

6 XI

7 Other methods of providing access to boating from the Hoschek  
8 property, such as the excavation of a cove or the construction of a  
9 railway, have been informally discussed, but no formal application for  
10 any alternative form of development has been filed with the city.

11 XII

12 Any Conclusion of Law which is deemed a Finding of Fact is hereby  
13 adopted as such.

14 From these Findings the Board comes to these

15 CONCLUSIONS OF LAW

16 I

17 The Mercer Island Shoreline Master Program sets forth the  
18 following requirements for shorelines' variances at Section  
19 19.04.130(s) of the City Code:

20 In specific cases the City of Mercer Island with approval  
21 of the Department of Ecology may authorize variances from  
22 specific requirements of this Section when there are  
23 practical difficulties or unnecessary hardships involved  
24 with carrying out the strict letter of the Shoreline  
25 Master Program. A shoreline variance will be granted  
26 only after the applicant can demonstrate the following:

1 (1). That the strict application of the bulk,  
2 dimensional or performance standards set forth in the  
3 applicable master program precludes a reasonable use of  
4 the property otherwise consistent with the master program.

5 (2). That the hardship described above is specifically  
6 related to the property, and is the result of unique  
7 conditions such as irregular lot shape, size, natural  
8 features or water depth and the application of the master  
9 program, and not, for example, from deed restrictions or  
10 the applicant's own actions.

11 (3). That the design of the project will be compatible  
12 with other permitted activities in the area and will not  
13 cause adverse effects to adjacent properties or the  
14 shoreline environment designation.

15 (4). That the requested variance will not constitute a  
16 grant of special privilege not enjoyed by the other  
17 properties in the area, and will be the minimum necessary  
18 to afford relief.

19 (5). That the public rights of navigation will not be  
20 adversely affected by the granting of the variance.

21 (6). That the public interest will suffer no substantial  
22 detrimental effect.

## 23 II

24 By statute the burden of proof in a review before this Board is on  
25 the appellant. RCW 90.48.140(7).

26 We conclude that the Hoscheks have failed to prove that the  
27 application of the sideline set back of the master program "precludes a  
reasonable use of the property otherwise consistent with the master  
program." The requirements of subsections (1) and (2) of the  
applicable variance standards have not been met.

1       Recreational use of the shoreline, including boating, is assuredly  
2 consistent with the master program. However, under the facts, such  
3 shoreline use from the Hoschek property is not precluded for lack of a  
4 pier and boat lift. Much of the time access to a boat can now be had  
5 from the existing bulkhead steps. At other times such access is  
6 possible, though with some difficulty.

7       This situation is not enough to meet the stringent hardship test of  
8 the master program. Problems arise not so much from the physical  
9 features of the property as from the physical condition of the  
10 applicants. While regretting the effects of growing older, we cannot  
11 transmute this concern into a principle of land use law. Entitlement  
12 to a variance does not depend on the age and agility of applicants, but  
13 rather on hardships imposed by the character of the property.

### 14                               III

15       The Hoscheks went to considerable effort to show that the lot in  
16 question was created in 1961 rather than 1966. In the absence of  
17 objection, we did review the material they submitted after the hearing  
18 on this point. But, we are unable to attach any relevance to the  
19 precise date the lot was created.

20       We are assured that its creation preceded the passage of the  
21 Shoreline Management Act in 1971, the master program's imposition of  
22 the setback at issue in 1974, the purchase of the property by members  
23 of the Hoschek family in 1981 and 1983, and the application for a  
24 variance in this case filed in 1986.



1 In the circumstances, no vested rights arose to a permit free from  
2 effective shorelines regulations. The vesting rule gives applicants  
3 the benefit of the state of the law at the time of application for a  
4 permit. It does not reach back further in time. See, Talbot v. Gray,  
5 11 Wn.App. 807, 525 P.2d 801 (1974).

6 IV

7 The Hoschek's claim of discriminatory enforcement is, in this civil  
8 context, essentially a request that the city be estopped from enforcing  
9 the sideline setback in this case.

10 Our findings do not sustain their position. But, even were we to  
11 find that permits had been issued contrary to regulations or that  
12 approval to violations had been given in the past, this would not  
13 prevent the city for enforcing its requirements here. See, City of  
14 Mercer Island v. Steinman, 9 Wn.App. 479, 513 P.2d 80 (1973). To hold  
15 otherwise would effectively permit acts of employees of a municipality  
16 to repeal measures adopted by the duly constituted legislative body.

17 V

18 The Hoscheks have also alleged that the city's denial of their  
19 variance application amounts to a taking of their property without just  
20 compensation or to a deprivation of due process of law.

21 We do not believe that these constitutional issues are properly  
22 within the authority given to this Board under the Shoreline Management  
23 Act. RCW 90.58.180. Accordingly, we address this case only under the  
24

1 statutory law and implementing regulations and do not rule on  
2 constitutional questions. See, Yakima County Clean Air Authority v.  
3 Glascam Builders, Inc., 85 Wn.2d 255, 534 P.2d 33 (1975).

4 VI

5 Any Finding of Fact which is deemed a Conclusion of Law is hereby  
6 adopted as such.

7 From these Conclusions of Law the Board enters this  
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ORDER

The decision of the City of Mercer Island denying a substantial development and variance permit to Frank and Dorothy Hoschek to construct a mooring pier and boat lift is AFFIRMED.

DONE this 11<sup>th</sup> day of ~~July~~<sup>September</sup>, 1987.

SHORELINES HEARINGS BOARD



WICK DUFFORD, Chairman



LAWRENCE J. FAULSTICH, Member



NANCY BURNETT, Member



DENNIS McLERRAN, Member



TOM COWAN, Member

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